Annie Quah Lay Nah v Syed Jafer Properties Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO NO B–02–623 OF 2005
GOPAL SRI RAM, LOW HOP BING AND RAUS SHARIF JJCA
19 SEPTEMBER 2006

Civil Procedure — Discontinuance — Whether discontinuance effective — Application to set aside intervening and transfer order made nine years after — Orders made in the face of notice of discontinuance — Whether second respondent in first appeal estopped by its conduct from relying on notice of discontinuance — Whether appellant in first appeal and other relevant parties were entitled to act upon the assumption that the intervention and transfer order had been accepted — Whether it was unjust to all parties to the present litigation to attempt to assert the validity of the notice of discontinuance

There were two appeals. The appellant and respondents were parties to a joint venture agreement. Disputes arose under the joint venture agreement, these were referred to arbitration. An award in the plaintiff's (first respondent in the first appeal) favour was handed down. Later, the plaintiff filed a summons to enforce the award. Subsequently, the appellant in the first appeal and the first respondent in the second appeal commenced an action to specifically enforce the joint venture agreement. Then the appellant in the first appeal and the first respondent in the second appeal took out a summons in chambers in the enforcement proceedings. By that summons, she applied to intervene in the enforcement proceedings and to have them transferred for the purpose of consolidating them with her own suit but the plaintiff filed a notice of discontinuance. When the summons for intervention came on for hearing the High Court made an order permitting intervention and a transfer of the proceedings ('intervention and transfer order'). Neither the plaintiff nor the second respondent in the first appeal lodged an appeal against the decision of High Court on the ground that the order ought not to have been made because the enforcement proceedings had been discontinued. After the transfer of the enforcement proceedings an order was made that the proceedings be consolidated with the civil suit. Later, consent judgment was entered in the consolidated actions. After some nine years after the High Court had made the intervention and transfer order, the second respondent in the first appeal took out summonses to set aside that order as well as the consent order. The appellant in the first appeal also took out summonses to set aside those summonses. The learned judge who heard the summonses dismissed them all. His principal ground for the orders he made was that as the enforcement proceedings had been discontinued, there was no action or suit or proceeding on which the High Court could have granted intervention and transfer.

It followed that there was nothing to set aside. Each side had brought an appeal against the decision made on its respective summonses.

Held, allowing the appeal:

(1) When the High Court made the intervention and transfer order in the face of the notice of discontinuance, the second respondent in the first appeal had two mutually exclusive courses open to him. Either to appeal against the order and challenge its validity on the ground that the notice of discontinuance had brought the enforcement action to an end or to remain silent and accept it. If he elected the former course it was incumbent upon him to lodge his notice of appeal to the Supreme Court within one month from the date of the impugned order. But he did not do that. He elected to remain silent. Therefore, the appellant in the first appeal and the other relevant parties were entitled to act upon the assumption that the High Court's intervention and transfer order had been accepted. The consent order had also been entered into on the same basis. It would be most unjust to all parties to the present litigation to attempt to assert the validity of the notice of discontinuance (see para 10).

(2) Since the learned judge did not enter upon the individual merits of each application but proceeded on the procedural ground, it was only proper that the summonses be remitted for re-consideration on their merits (see para 13).

[Bahasa Malaysia summary

Terdapat dua rayuan. Perayu dan responden-responden adalah pihak-pihak kepada satu perjanjian usahasama. Pertelingkahan berbangkit dari perjanjian usaha sama tersebut, dan ianya dirujuk ke timbangtara. Satu award telah diberikan memihak kepada pihak plaintif (responden pertama dalam rayuan pertama). Plaintif kemudiannya telah memfailkan satu saman untuk menguatkuasakan award tersebut. Selepas itu, perayu di dalam rayuan pertama dan perayu pertama di dalam rayuan kedua memulakan satu tindakan untuk menguatkuasakan perjanjian usahasama tersebut. Seterusnya perayu di dalam rayuan pertama dan responden pertama dalam rayuan kedua mengeluarkan satu saman dalam kamar untuk prosiding penguatkuasaan. Melalui saman tersebut, beliau memohon untuk mencelah prosiding penguatkuasaan dan untuk memindahkannya bagi tujuan menyatukannya dengan guamannya tetapi plaintif memfailkan notis pemberhentian. Apabila saman mencelah itu dibawa untuk bicara Mahkamah Tinggi membuat satu perintah membenarkan celahan dan prosiding pindahan ('perintah celahan dan pindahan'). Plaintif dan juga responden kedua dalam rayuan pertama tidak memfailkan sebarang rayuan terhadap keputusan Mahkamah Tinggi atas alasan yang perintah tersebut tidak wajar dibuat kerana prosiding penguatkuasaan telah diberhentikan. Selepas pindahan prosiding penguatkuasaan, satu perintah dibuat yang bahawa prosiding tersebut disatukan dengan guaman sivil itu. Kemudian dari itu, satu penghakiman persetujuan telah dimasukkan dalam tindakan-tindakan yang

disatukan itu. Sembilan tahun selepas Mahkamah Tinggi membuat perintah celahan dan pindahan itu, responden kedua dalam rayuan pertama mengeluarkan saman untuk mengenepikan perintah tersebut dan juga perintah persetujuan itu. Perayu di dalam rayuan pertama juga mengeluarkan saman untuk mengenepikan saman-saman tersebut. Yang arif hakim telah mendengar saman-saman tersebut dan menolaknya. Alasan utamanya bagi keputusannya ialah memandangkan prosiding penguatkuasaan telah diberhentikan, tidak terdapat sebarang tindakan atau guaman atau prosiding yang boleh dicelah atau dipindah oleh Mahkamah Tinggi. Dari itu tiada apa untuk diketepikan. Setiap pihak membuat rayuan terhadap keputusan yang diberikan berhubung dengan saman-samannya yang tersendiri.

Diputuskan, membenarkan rayuan:

(1) Apabila Mahkamah Tinggi membuat perintah celahan dan pindahan pada kewujudan notis pemberhentian itu, responden kedua dalam rayuan pertama mempunyai dua jalan yang terbuka kepadanya. Sama ada untuk merayu terhadap perintah dan membantah kesahannya atas alasan bahawa notis pemberhentian telah menjadikan tindakan penguatkuasaan diberhentikan atau untuk berdiam diri dan menerimanya. Jika beliau memilih jalan yang terdahulu, adalah penting baginya untuk memfailkan notis rayuannya kepada Mahkamah Agung dalam masa sebulan dari tarikh perintah itu dibuat. Akan tetapi beliau tidak berbuat demikian. Beliau memilih untuk berdiam diri. Oleh yang demikian, perayu dalam rayuan pertama dan pihak-pihak yang relevan berhak untuk bertindak pada anggapan yang perintah celahan dan pindahan Mahkamah Tinggi itu diterima. Penghakiman persetujuan juga telah dimasukkan pada asas yang sama. Ianya adalah tidak adil kepada kesemua pihak dalam litigasi semasa untuk cuba mengesahkan kesahan notis pemberhentian tersebut (lihat perenggan 10).

(2) Oleh kerana yang arif hakim tidak meneliti merit setiap permohonan tersebut tetapi terus menimbang alasan prosedur, adalah wajar saman-saman tersebut di remit semula untuk dipertimbangkan semula pada meritnya (lihat perenggan 13).]

Notes

For cases on effective discontinuance, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2164–2166.

Cases referred to

Badiaddin Bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (refd)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565 (refd)

Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd [1985] 1 MLJ 7 (refd)

Legislation referred to

Rules of the High Court 1980 O 21 rr 2(1), 3

Joginder Singh (PM Malingam, CT Annathurai and Sharmala Batumalai with him) (Hamzah, Sulaiman & Partners) for the appellant.
T Kuhan (Bahri Kuhan Yeoh & Ghandi) for the first respondent.
K Kirubakaran (Nadzarin Wok Nordin and Jack Siose with him) (Nadzarin Kuok Puthucheary & Tan) for the second respondent.
R Sharen (Gerard Samuel & Associates) for the third respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] There are two appeals before us. They are Civil Appeal Nos B-02-623-05 ('the first appeal') and B-02-625-05 ('the second appeal'). They vividly illustrate the operation of the doctrine of estoppel in the sphere of procedural law. The relevant facts are as follows. The litigants before us were parties to a joint venture agreement. Disputes having arisen under that agreement, these were referred to arbitration. An award in the plaintiff's favour was handed down on 29 January 1988. Later, on17 July 1990 the plaintiff (first respondent in the first appeal) filed a summons to enforce the award under the provisions of the Arbitration Act 1952. It was filed in the Appellate and Special Powers Division of the Kuala Lumpur High Court. On 28 February 1992, the appellant in the first appeal and the first respondent in the second appeal commenced an action in the Shah Alam High Court to specifically enforce the joint venture agreement. Then, on 24 September 1993, the appellant in the first appeal and the first respondent in the second appeal took out a summons in chambers in the enforcement proceedings in Kuala Lumpur. By that summons she applied to intervene in the enforcement proceedings and to have them transferred to Shah Alam for the purpose of consolidating them with her own suit. Her summons was made returnable on 30 November 1993. But a day earlier, on 29 November 1993, the plaintiff filed a notice of discontinuance.

[2] I now come to 30 November 1993. The summons for intervention came on for hearing before Abu Mansor J (later FCJ). The order made by his lordship shows that all relevant parties now before us in this appeal were represented: in particular the plaintiff and the appellants in the second appeal (respondents in the first appeal). It reflects that all counsel were heard. It also reflects that an order permitting intervention and a transfer of the proceedings to the High Court at Shah Alam was made. Neither the plaintiff nor the second respondent in the first appeal lodged an appeal against the decision of Abu Mansor J on the ground that the order he made ought not to have been made because the enforcement proceedings had been discontinued a day earlier.

[3] After the transfer of the enforcement proceedings to the Shah Alam High Court, that court, on 4 May 1994 ordered those proceedings to be consolidated with the civil suit before it. Later, on 2 March 1999 consent judgment was entered in the consolidated actions transferring the land that formed the subject matter of the Shah Alam action to the appellant in the first appeal and the first respondent in the second appeal.

[4] In February 2002, after the passage of some nine years after Abu Mansor J had made his order, the second respondent in the first appeal took out summonses to set aside that order as well as the consent order of 2 March 1999. The appellant in the first appeal also took out summonses to set aside those summonses, although I must be forgiven for being unable to comprehend the necessity of these latter applications. For, if the second respondent in the first appeal was unable to persuade the court on its summonses, then *cadit quaestio*. The latter applications took the matter no further except to incur costs. The learned judge who heard the four summonses dismissed them all. His principal ground for the orders he made was this. As the enforcement proceedings had been discontinued, there was no action or suit or proceeding on which Abu Mansor J could have granted intervention and transfer. The enforcement proceedings were dead as a doornail. It followed that there was nothing to set aside. Each side has brought an appeal against the decision made on its respective summonses.

[5] By reason of O 21 r 2(1) of the Rules of the High Court 1980 ('the RHC'), a plaintiff has an unqualified right to discontinue his or her action against a defendant without leave of the court provided he or she does so before service of the defence. Then, O 21 r 3 says this:

> (1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.
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> (2) An application for the grant of leave under this rule may be made by summons.

[6] In the present instance, it is the case for the respondents in the first appeal that the notice of discontinuance was good. On the other hand, the appellant in the first appeal argues that this was a case in which discontinuance with leave was necessary so that the notice of discontinuance was bad. The short answer to that argument is that no proceedings were ever brought by the appellant in the first appeal to set aside the notice of discontinuance. So, for present and all other purposes the notice of discontinuance was and remained valid as a matter of pure procedural law. And if this were the only argument, then the first appeal is doomed to failure. But Mr Joginder Singh raised a second and far more formidable argument in support of his appeal. He says that the second respondent in the first appeal is estopped by its conduct from relying on the notice of discontinuance. In my judgment there is merit in this submission.

[7] Now, it is a general rule — applying strict principles of adjectival law — that once an action has been withdrawn by a notice of discontinuance, there is nothing left on which the court may adjudicate. However, where the parties to a cause or matter have proceeded upon a common assumption that a notice of discontinuance is not to be acted upon, then, the court will not permit either party to assert the

propriety of the discontinuance. There is a slightly different way of stating the same proposition. It is this. If one of the parties to litigation is faced with two mutually exclusive alternatives and he elects to pursue one then he will be estopped from retreating from the position he has adopted by his election.

[8] Spencer, Bower and Turner, *The Law relating to Estoppel by Representation* (3rd Ed, 1977) summarises the law on the subject as follows:

> The last of the four fields in which the doctrine under discussion may be observed in operation, and, perhaps, the most important and interesting of them all, because yielding the greatest variety of illustrative examples, is the conduct of litigation, in the course of which it very frequently happens that a party litigant is confronted with the necessity of immediately making a definite choice between two possible courses of action which are mutually exclusive. Whenever this occurs, the general rule of estoppel by election comes into play: that is to say, if by words, or (as is almost invariably the case) by conduct or inaction, he represents to the other party litigant his intention to adopt one of the two alternative and inconsistent proceedings or positions, with the result that the latter is thereby encouraged to adopt or persevere in a line of conduct which he otherwise would have abandoned or modified, or (as the case may be) to change tactics from which he otherwise would never have deviated, the first party is estopped, as against his antagonist, from resorting afterwards to the course or attitude which, of his free choice, he has waived or discarded.

[9] The Judicial Committee of the Privy Council applied the foregoing passage with approval in *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7. In *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565, the principle was stated as follows (at pp 583 and 586):

> I now turn to consider the argument mounted upon the doctrine of estoppel. The answer to the complaint made by counsel lies in appreciating the true nature of the doctrine. As observed by Mohd Azmi FCJ during argument, the doctrine is essentially equitable in nature. It is a rule by which justice is done according to the facts and circumstances of a particular case and its operation depends much upon the conduct of the parties. It is therefore extremely flexible in its application because it moulds itself to fit a particular fact pattern. Accordingly, the categories of cases to which the doctrine applies are not closed.
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> In the context of litigation, it usually arises where a party to an action has at least two alternative and mutually exclusive courses open to him. If by words or conduct he elects to pursue one of them and thereby leads his opponent to believe that he has abandoned the other, he may, if the circumstances so warrant, be precluded from later changing course. Decisions upon the application of the doctrine to litigation are but mere illustrations of the broader proposition. Indeed, this is true of all cases where the doctrine has been applied to other spheres of human activity.
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> ...
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> Accordingly, the global question which a court must ask itself is this: is it just and equitable that the particular litigant (against whom the estoppel is raised) should succeed, given the totality of the facts and circumstances of the case? If the answer to that question is in the affirmative, estoppel does not bite: if the answer is in the negative, then it does.

[10] Now, apply the principle to the fact pattern here. On 30 November 1993, when Abu Mansor J made his order in the face of the notice of discontinuance, the

second respondent in the first appeal had two mutually exclusive courses open to him. Either to appeal against the order and challenge its validity on the ground that the notice of discontinuance had brought the enforcement action to an end or to remain silent and accept it. If he elected the former course it was incumbent upon him to lodge his notice of appeal to the Supreme Court within one month from the date of the impugned order. But he did not do that. He elected to remain silent. For nine years. So, the appellant in the first appeal and the other relevant parties were entitled to act upon the assumption that Abu Mansor J's order had been accepted. The consent order had also been entered into on the same basis. Is it fair, just or equitable for the first respondent in the second appeal to say after nine years that Abu Mansor J's order should be set aside because of the notice of discontinuance? I think that that question must receive a negative response. Indeed, it would be most unjust to all parties to the present litigation to attempt to assert the validity of the notice of discontinuance.

[11] Mr Kirubakaran of counsel for the second respondent in the first appeal, whose submissions were adopted by counsel for the other respondents argued that the order of 30 November 1993 is a nullity because the notice of discontinuance brought the enforcement proceedings to an end so that there was no cause in which Abu Mansor J could make an order. In support of this submission, he relied on *Badiaddin Bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393. But that authority does not assist him as this is not a case where there has been a breach of the rules of natural justice or a contravention of a statute which is a sine qua non to invoke the very limited jurisdiction of a court to have its orders declared as void. In this context, I can do no better than to quote from the judgment of Mohd Azmi FCJ in *Badiaddin*:

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[12] On the facts of the present case, there was, at best, non-compliance of a rule of court: not of a substantive statutory provision. Hence, the principle contended for by the second respondent in the first appeal has no application to the facts of the present instance. I must hasten to add that I have used the expression 'at best' advisedly because it does not lie in the mouths of the relevant respondents in the first appeal to assert that the notice of discontinuance was intended to be acted upon by any of them for the reasons discussed earlier.

[13] For the reasons already given, I find myself unable to agree with the learned judge's decision. Since he did not enter upon the individual merits of each application but proceeded on the procedural ground, it is only proper that the summonses be remitted for re-consideration on their merits. Accordingly, at the close of arguments, it was ordered that both appeals be allowed. The summonses were remitted to the High Court for re-hearing on merits. All costs thus far incurred were directed to follow the event of the re-hearing. The deposits in court were ordered to be refunded to the respective appellants.

Appeal allowed.

Reported by Peter Ling